**MULTI INRICH SDN BHD**

**v.**

**SME BANK BHD**

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
STEPHEN CHUNG JC
[CIVIL SUIT NO: K22-189-2009]
8 APRIL 2011

***LANDLORD AND TENANT:*** *Tenancy - Recovery of immovable property - Expiry of tenancy agreement - Whether landlord wrongfully seized property - Whether tenant given sufficient notice - Whether tenant voluntarily delivered possession of factory - Whether s. 7(2) of the Specific Relief Act 1950 applicable - Specific Relief Act 1950, s. 7(2)*

SME Bank Berhad ('the defendant') was set up primarily to assist small and medium enterprises in the country. Through a scheme under which it owned factories, it leased one of its factories to the plaintiff to operate its business. The plaintiff was set up by Encik Karim, who was also involved in the day to day operations of the plaintiff. The plaintiff claimed that on 30 June 2009, before the expiry of the tenancy, without its consent and without any court order, the defendant's servants and/or agent had wrongfully seized possession of the factory by locking up the factory which was still in operation. The plaintiff also claimed that the defendant had wrongfully detained the plaintiff's machineries and raw materials and hence claimed against the defendant for special damages including loss of profits and loss of projected profits. The plaintiff also claimed damages for wrongful detention of the machineries, an order for the return of the machines and for general damages. The defendant, in denying the plaintiff's claim contended that Encik Karim had requested the defendant to collect the keys to the factory upon expiry of the tenancy and the keys were voluntarily handed over to the defendant's servants or agents. The defendant also pleaded that the plaintiff had wilfully failed and refused to remove the machineries and raw materials and failed to deliver vacant possession of the factory to the defendant and therefore counterclaimed for double rent for the factory. The issue for the court's determination was whether the defendant had wrongfully seized possession of the factory by locking up the factory which was still in operation without the consent of the plaintiff and contrary to the requirement of s. 7(2) of the Specific Relief Act 1950 ('SRA').

**Held (dismissing the plaintiff's claim and allowing the defendant's counterclaim for double rent with costs to be taxed):**

**(1)** The plaintiff knew that there was no further extension of the tenancy after 30 June 2009. The defendant had also sent two reminders prior to the coming into expiry of the tenancy, and there was a telephone call made to Encik Karim reminding him of the expiry of the tenancy and the need to deliver the keys and vacant possession of the factory to the defendant. Hence, the allegation that the defendant's officer in charge had threatened to close the factory on 30 June 2009 could not be true. (para 18)

**(2)** The handing over form filled in and signed by Encik Karim did not state that the plaintiff was forced to leave or was wrongfully evicted from the factory. In fact, Encik Karim had voluntarily given the keys of the factory to DW3 and delivered possession of the factory to the defendant upon the expiry of the tenancy. Hence, the plaintiff was no longer in occupation of the factory and therefore s. 7(2) of the SRA was not applicable. (para 22)

**(3)** The documentary evidence produced by the plaintiff did not support the averment that the plaintiff had confirmed orders for ornamental gutters amounting to RM3,457,701. If the plaintiff had confirmed orders of a few million ringgit as alleged, it would have quickly looked for a new place to move its business. Based on the evidence, it appeared that the sale and purchase agreement to buy a parcel of land, purportedly to move its business, and the business projection was prepared by the plaintiff for the purposes of this suit. The evidence and documentary exhibits did not support the plaintiff's claims for loss of profits and loss of projected profits and hence did not support the claims against the defendant. (paras 26-29)

**Case(s) referred to:**

*Dr Harjit Singh v. Suhaimi bin Samat & Anor [1995] 1 LNS 62 HC* ***(refd)***

*Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd [2009] 6 CLJ 626 CA* ***(refd)***

*Metro Charm Sdn Bhd v. Lee Nyan Hon & Brothers Sdn Bhd & Anor [2008] 7 CLJ 60 HC* ***(refd)***

**Legislation referred to:**

Specific Relief Act 1950, s. 7(2), (3)

*For the plaintiff - Hj Ansari Abdullah; M/s Ansari & Co*
*For the defendant - Safrin Saleh Nain; M/s Cheu Adnan & Razi*

*Reported by S Barathi*

## JUDGMENT

**Stephen Chung JC:**

**[1]** The plaintiff was a business set up by Encik Abdul Karim bin Ahmad who was involved in the day to day operations of the plaintiff. As he was an undischarged bankrupt, his children were the shareholders and directors of the company. The plaintiff obtained a loan of RM795,000 from Malayan Banking Bhd with a guarantee by Credit Guarantee Corporation Malaysia Bhd (CGC) to finance the business operations.

**[2]** The defendant was set up primarily to assist small and medium enterprises (SME) in the country. The defendant had an incubator scheme under which it owned factories which were leased to SME which did not have their own premises for their business. After the SME were sufficiently established, they had to move or rent their own premises. The plaintiff rented a factory at Lok Kawi, from the defendant to operate its business.

**[3]** By a tenancy agreement dated 17 August 2006 (exh. P1), the plaintiff rented Lot 4, Kompleks Kilang SME Bank at Lok Kawi Industrial Estate, Kota Kinabalu (the factory) from the defendant to operate a factory to manufacture ornamental or commercial gutters. The plaintiff claimed that on 30 June 2009 at about 4pm, before the expiry of the tenancy, without its consent and without any court order, the defendant's servants and or agents had wrongfully seized possession of the factory by locking up the factory which was still in operation.

**[4]** The plaintiff claimed that at the material time it had secured orders for ornamental gutters amounting to RM3,457,701. The plaintiff claimed that the defendant had wrongfully detained the plaintiff's machineries and raw materials valued at about RM1,000,000. The plaintiff claimed against the defendant for special damages including loss of profits and loss of projected profits amounting to RM35,812,076, damages for wrongful detention of the machines, an order for the return of the machines and for general damages.

**[5]** The defendant denied the plaintiff's claims stating that Encik Karim on behalf of the plaintiff had requested the defendant to collect the keys to the factory upon expiry of the tenancy and that the keys were voluntarily handed over to the defendant's servants or agents. The defendant also pleaded that at the time the keys were handed over, Encik Karim advised that the plaintiff did not have any place to put the machineries and raw materials and that the plaintiff would be responsible for the machineries and raw materials that were left behind in the factory. The defendant pleaded that since then, the plaintiff had willfully failed and refused to remove the machineries and raw materials and failed to deliver vacant possession of the factory to the defendant. The defendant counterclaimed a sum of RM3,076 per month being double rent for the factory from 1 July 2009 until possession is given to the defendant.

**[6]** The issue for trial is whether the defendant wrongfully seized possession of the factory by locking up the factory which was still in operation without the consent of the plaintiff and contrary to the requirement of s. 7(2) of the Specific Relief Act 1950.

**[7]** Section 7(2) provides that where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court and s. 7(3) provides that "occupier" means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.

**[8]** Our courts have consistently held that s. 7(2) has relegated the remedy of self-help into oblivion. The right of the landlord to recover possession of tenanted property is to be exercised only by way of a court action: *Dr Harjit Singh v. Suhaimi bin Samat & Anor* [1995] 1 LNS 62, *Metro Charm Sdn Bhd v. Lee Nyan Hon & Brothers Sdn Bhd & Anor* [2008] 7 CLJ 60 and *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 1 LNS 866. Failure to comply with this requirement will subject the landlord to reinstate and to compensate the tenant to its original position before the unlawful eviction.

**[9]** The question is whether the plaintiff voluntarily gave possession of the factory by delivering the keys of the factory to the defendant's servants or agents on 30 June 2009 as the defendant contended or whether the defendant wrongfully seized possession and evicted the plaintiff contrary to s. 7(2) of the Specific Relief Act. Encik Karim testified that he did not telephone any officers of the defendant asking them to collect the keys to the factory. He said that what he did was only to telephone to find out whether the defendant's office in Kota Kinabalu had received any letter from its head office approving the extension to the tenancy requested by the plaintiff. He said that it did not make any sense for him to ask the defendant to collect the keys as the plaintiff did not have any place to move to and was still waiting for the reply from the defendant's head office at Kuala Lumpur to its appeal in respect of its tenancy.

**[10]** Jali bin Bali (DW5) testified that on 30 June 2009 at about 8.10am he received a telephone call from Encik Karim, asking him who would collect the keys to the factory from the plaintiff. DW5 said that he told Encik Karim that he was in Malacca and advised Encik Karim to contact his office in Kota Kinabalu. DW5 said that he then telephoned Md Redzuan bin Rahman (DW4), who was the officer in charge, to inform DW4 of the telephone conversation with Encik Karim. DW5 said that after he had telephoned DW4, he received another call from Encik Karim who told him that he had telephoned the defendant's office in Kota Kinabalu but there was no answer. DW5 told Encik Karim that it was too early as it was not office hours yet and there would be no one in the office. He advised Encik Karim to contact the Kota Kinabalu office later. Encik Karim was asked twice about these telephone conversations with Encik Jali bin Bali. Instead of denying, each time he answered he could not remember.

**[11]** Augustine Jumat @ Mohamad Anuar (DW3) testified that on 30 June 2009 at about 8.30am he received a telephone call from Encik Karim who wanted to find out who would represent the defendant to collect the keys to the factory from the plaintiff. He told Encik Karim that as the officer who was in charge was attending a course in Kuala Lumpur he would have to find out from this officer or from the branch manager. He said that he called DW4 who advised him to seek the direction of the branch manager. He said that he then sought the direction of the branch manager who instructed him to collect the keys from Encik Karim.

**[12]** From the first schedule of the tenancy agreement dated 17 August 2006, the tenancy was for a period of two (2) years commencing from 1 July 2006 and expiring on 30 June 2008 at a monthly rental of RM1,538, with an option to renew for a period of another year. Part 11 of the first schedule stated that the factory was to be used only to manufacture commercial gutters.

**[13]** By a letter dated 26 May 2008 (exh. D2), prior to the expiry of the tenancy, the defendant offered to extend the tenancy for a period of six months from 1 July 2008 (although it was wrongly stated in the first schedule of the letter that it was to be from 1 June 2008). The plaintiff accepted this offer of extension and the parties entered into another tenancy agreement dated 1 August 2008 (exh. D3) in respect of the new six month tenancy which would expire on 31 December 2008.

**[14]** By another letter dated 19 January 2009 (exh. P3), the defendant agreed to extend the tenancy of the factory to the plaintiff for another six months commencing from 1 January 2009 and expiring on 30 June 2009 subject to the provisions that there would be no further extension to the tenancy and that the factory was only to be used for packaging and distribution of "Lactovida", a health drink (see part 6 and part 7 of the first schedule of this letter). The parties did not sign any new agreement in respect of this extension.

**[15]** Although the plaintiff also did not sign on this letter to indicate that it had accepted the offer of extension or the terms and conditions contained in the letter, the plaintiff in para. 6 of the statement of claim had pleaded that the defendant offered the plaintiff a six month extension commencing 1 January 2009 until 30 June 2009 which was duly accepted by the plaintiff. The evidence established that the plaintiff had continued to rent and use the factory until 30 June 2009. The evidence established that the plaintiff had continued to manufacture commercial or ornamental gutters in the factory although from 1 January 2009 in accordance to P3 the factory was only to be used for the packaging and distribution of Lactovida. The evidence also established that notwithstanding that, the defendant did not take any action against the plaintiff for continuing to manufacture gutters in the factory.

**[16]** The evidence showed that the defendant sent a letter dated 29 May 2009 (exh. D7) to the plaintiff reminding that the tenancy would expire on 30 June 2009 and that the plaintiff should make arrangements to move its business to a new location upon expiry of the tenancy. This was a standard letter issued by the defendant to its tenants before the expiry of any tenancy and was similar to the letter dated 3 April 2008 (exh. P2) sent to the plaintiff. The plaintiff then wrote a letter dated 16 June 2009 (exh. P5) to the defendant requesting for a one year extension of the tenancy in respect of the factory because it was still in the process of acquiring a parcel of land and building its own factory at Lok Kawi.

**[17]** Before receipt of the plaintiff's letter, the defendant had by a letter dated 17 June 2009 (exh. P4) reminded the plaintiff that the tenancy would expire on 30 June 2009 and for the plaintiff to hand over possession of the factory by delivering the keys of the factory on 30 June 2009. Subsequently, by a letter dated 19 June 2009 (exh. P6), which was in reply to the plaintiff's letter dated 16 June 2009, the defendant advised that it could not agree to the plaintiff's request for the tenancy to be extended and referred to the defendant's letter of reminder dated 17 June 2009 for the plaintiff to give possession of the factory to the defendant on 30 June 2009. The plaintiff then sent a letter of appeal dated 22 June 2009 (p. 46 of PBOD1) to the defendant requesting for another one year extension. The defendant did not reply to this letter nor agree to any such extension.

**[18]** From the evidence, the plaintiff through Encik Karim and the directors who are his children knew that the tenancy was extended for only six months from 1 January 2009 until 30 June 2009 and that there would be no further extension to the tenancy. Prior to the expiry of the tenancy, the defendant had sent two reminders to the plaintiff advising of the coming expiry of the tenancy and that the plaintiff should make plans to move and to deliver vacant possession of the factory to the defendant upon its expiry. In fact, on 25 June 2009, Encik Karim received a telephone call from DW4 who again reminded Encik Karim of the expiry of the tenancy and the need for the plaintiff to deliver the keys and vacant possession of the factory to the defendant. Encik Karim's allegation that DW4 threatened to close the factory on 30 June 2009 could not be true because DW4 had told Encik Karim that both DW4 and DW5 would be away in Kuala Lumpur on 30 June 2009.

**[19]** The evidence of DW3, DW4 and DW5 established that Encik Karim did on 30 June 2009 telephone DW5 and DW3 to enquire whether the defendant's office in Kota Kinabalu had received any letter from its head office agreeing to extend the tenancy of the plaintiff. Since there was no such letter, he then enquired who would be collecting the keys to the factory on 30 June 2009 at about 4pm.

**[20]** If Encik Karim did not make any arrangement for a representative of the defendant to collect the keys, DW3 would not have gone to the factory at the appointed time to collect the keys as it was not within his scope of duties and he was not instructed to do so prior to 30 June 2009. The officer who was responsible to do so was DW4 who was then in Kuala Lumpur. DW4 did not instruct DW3 to collect the keys or to lock up the factory. It was only because of Encik Karim's telephone calls to DW5 and to DW3, and on DW5's advice to DW3 to seek the direction of the branch manager, that DW3 was then instructed by the branch manager to collect the keys because DW4 and DW5 were in Kuala Lumpur. Prior to and on 30 June 2009, DW3 did not plan nor intend to lock up the plaintiff's factory at Lok Kawi.

**[21]** The evidence showed that when DW3 arrived at the factory, he did not enter the factory. He waited for Encik Karim to come out to give him the keys. It was only, when Encik Karim did not come out, after he had waited for about an hour that he asked a security guard (PW2) to go inside the factory to inform Encik Karim that DW3 was waiting outside the factory to collect the keys as pre-arranged with Encik Karim that morning. PW2 said that he told everybody inside the factory to leave as instructed but DW3 said that he did not give any such instructions to the security guard.

**[22]** The handing-over form filled in and signed by Encik Karim did not state that the plaintiff was forced to leave or was wrongfully evicted from the factory. There was no complaint made against the defendant when the keys were handed to DW3 by Encik Karim. When Encik Karim gave the keys of the factory to DW3, it was voluntary and not under protest. Encik Karim also informed DW3 that the plaintiff did not have any place to put its machinery and equipment but the plaintiff would bear the responsibility for continuing to keep the machinery and equipment

in the factory. As the plaintiff had voluntarily given the keys and delivered possession of the factory to the defendant upon the expiry of the tenancy, the plaintiff was no longer in occupation of the factory. Therefore s. 7(2) does not apply.

**[23]** From the evidence, the plaintiff's business was not doing very well. No doubt its revenue had improved progressively from RM108,336 in 2005 to RM915,927 in 2008 but the profit after tax was only RM15,172 in 2005 and RM92,756 in 2008.

**[24]** Contrast that with the balance sheet for the year ended 30 June 2008 which showed that the plaintiff only had RM690 as cash and bank balance while its overdraft and bank balance amounted to RM602,499 and RM233,763 respectively. The balance sheet also showed that its machinery was valued at RM240,000 only and did not support the plaintiff's claims that the equipment machinery and raw materials were valued at RM1,000,000 at the material time. The plaintiff chose not to exhibit its account for the year ended 30 June 2009 although its business projection for 2009 to 2018 was prepared in August 2009 (exh. P17). By that time the plaintiff's loan had been classified as a non-performing loan (NPL) by the bank.

**[25]** The evidence established that the plaintiff entered into a sale and purchase agreement (exh. P12A) to buy a parcel of land only on 27 July 2009 to construct its factory, after the expiry of the tenancy and delivery of the keys of the factory to the defendant. Although cl. 3(a) provided that the plaintiff was to pay RM17,000 as deposit and partpayment of the purchase price upon the execution of the sale and purchase agreement, the plaintiff was only able to pay RM7,000 for the transaction and was not financially able to complete the purchase.

**[26]** Although the plaintiff pleaded that it had confirmed orders for ornamental gutters amounting to RM3,457,701, the documentary evidence produced by the plaintiff did not support such averments nor Encik Karim's testimony in these respects. The quotations exhibited at pp. 220 to 225 of PBDO2 were not signed nor accepted by the customers of the plaintiff. The writ (exh. P18) which claimed RM2,527,000 against the plaintiff for breach of contract for failure to supply gutters referred to the plaintiff's factory with an address at Batu Caves, Selangor Darul

A Ehsan and not to the plaintiff's factory at Lok Kawi, Kota Kinabalu. There was no evidence whether the plaintiff's factory at Batu Caves was still in operation. The letter dated 16 June 2009 (P5) and the letter dated 22 June 2009 from the plaintiff to the defendant did not state that the plaintiff had secured a contract B to supply gutters amounting to RM2,527,000 or RM3,006,000 to be manufactured at the factory at Lok Kawi as the reason for the plaintiff's application for extension of the tenancy of the factory.

**[27]** If the plaintiff had confirmed orders of a few million ringgit C as alleged, it would have quickly looked for a new place to move its machinery, equipment and raw materials and continued with its business operations at the new premises in order to fulfill the orders or refused to give up possession of the factory pending court proccedings by the defendant to recover possession of the D factory while it fulfilled the orders. The plaintiff did not do so. It chose to deliver possession of the factory to the defendant and to leave the machinery, equipment and raw materials at the factory.

E **[28]** It would appear that the plaintiff prepared the sale and purchase agreement dated 27 July 2009 and the business projection dated August 2009 for the purposes of this suit. The evidence and documentary exhibits did not in any way support the plaintiff's claims that its loss of profits and loss of projected profits would amount to RM35,812,076. The evidence and documentary F exhibits adduced during the trial also did not support the plaintiff's claims against the defendant.

**[29]** For the reasons given, the plaintiff's claim is dismissed and the defendant's counterclaim for double-rent is allowed. The G defendant is to refund the two month rental deposit to the plaintiff. The defendant is also to refund the deposit for water supply or the balance thereof (if any) after deductions for water supplied up to 30 June 2009. Costs to the defendant to be taxed, if not agreed.

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